Applicant Details

First Name	**Candace**
Last Name	**Caruthers**
Citizenship Status	**U. S. Citizen**
Email Address	**caruthers.candace@gmail.com**
Address	**Address** Street **9123 E Mississippi Ave, Apt 10-304** City **Denver** State/Territory **Colorado** Zip **80247** Country **United States**
Contact Phone Number	**4404527251**

Applicant Education

BA/BS From	**University of Houston-Main Campus**
Date of BA/BS	**August 2015**
JD/LLB From	**Howard University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50906&yr=2011**
Date of JD/LLB	**May 1, 2019**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Howard Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Outlaw III, Lucius
lucius.outlaw@law.howard.edu
Bawa, Jasbir
profjbawa@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Candace Caruthers, Esq.
9123 East Mississippi Ave. 10-304
Denver, CO 80247

June 12, 2023

Dear Judge Daniel,

I am writing to express my interest in clerking in your chambers during the 2023-2024 term.

By way of background, I am currently an Appellate Federal Public Defender with the Federal Public Defender for the Districts of Colorado and Wyoming. Before joining the federal defender in October 2021, I worked as a NJ state appellate public defender for two years. For law school I attended Howard University School of Law where I graduated *cum laude* in the top ten percent of my class, served on the *Howard Law Journal*, and worked as a Dean's Fellow teaching legal citation during my final year.

I believe I would make a strong addition to your chambers. I have practiced for nearly two years before the Tenth Circuit. This experience has equipped me with significant substantive legal knowledge and prepared me to offer Your Honor thorough and efficient legal research. Also, with almost four years of experience as an appellate attorney, I will bring my skills as an excellent legal writer and be well-equipped to assist you with drafting legal opinions. Finally, as my experience as a law clerk for the Government Accountability Office reflects, my advice to you will be unbiased, balanced, and well-informed.

Included with this application are my resume, law school transcript, and writing samples. My references are the following:

Jasbir Bawa Phone: 202-538-1255 Email: profjbawa@gmail.com
Howard Law Professor (Legal Research & Writing I & II)

Lucious Outlaw Phone: 202-997-3452 Email: lucius.outlaw@law.howard.edu

Thank you for taking the time to consider my credentials. I look forward to the prospect of interviewing with you. Please feel free to contact me with any questions you may have at (440) 452-7251 or caruthers.candace@gmail.com.

Respectfully,

Candace Caruthers, Esq.

Candace Caruthers
ATTORNEY

9123 East Mississippi Ave. Apt 10-304
Denver, CO, 80247
Caruthers.Candace@gmail.com
(440) 452-7251

About Me

I am a young, passionate appellate advocate. Over the past 3.5 years, I have represented dozens of clients in their state and federal direct criminal appeals.

Admissions

State Bar of New Jersey, October 2019

Academic Background

Howard University School of Law, May 2019
Juris Doctor, *cum laude*
GPA/Rank: 90.63|13/140 (Top 10%)
Journal: Senior Notes & Comments Editor, *Howard Law Journal*
Honors: CALI Awards for the highest grades in Legal Reasoning, Research & Writing I (Spring 2017) and Criminal Trial Advocacy (Fall 2018);
Merit Scholarship Recipient (Fall 2018 Academic Year);
2019 Burton Award Winner, a nationwide contest for excellence in legal writing;
"Social Justice Warrior" Pro-Bono Pledge Graduate for completing over 100 pro-bono hours
Activities: Gospel Choir;
Property Teaching Assistant (2L AY)

University of Houston, August 2015
Bachelor of Arts, *cum laude*, *in Political Science*
GPA: 3.46
Honors: Dean's List (Spring 2014)
Activities: Concert Women's Chorus

Publications

Candace Caruthers, *Comment*, *When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses*, 62 How. L.J. 277 (2018).

Work Experience

Incoming Judicial Law Clerk
U.S. Court of Appeals for the Tenth Circuit
The Honorable Veronica S. Rossman
January 2025 – December 2025

Uniform Bar Exam Practice Essay Grader
J.D. Advising
November 2022 – Current (seasonal)

Assistant Federal Public Defender
Federal Public Defender for the Districts of Colorado and Wyoming, Appellate Section
October 2021 – Current

- Filing briefs (nine to date) and participating in oral arguments (five to date) before the Tenth Circuit.

Assistant Deputy Public Defender III
New Jersey Office of the Public Defender, Appellate Division
September 2019 – October 2021

- Filed one brief before the NJ Supreme Court and filed fifteen briefs and argued seven times before the Appellate Division.

Henry Ramsey Dean's Fellow
Howard University School of Law
Professor Jasbir Bawa
August 2018 – May 2019

- Instructed a Writing Lab on legal citation for first-year students and held at least six office hours per week with students.

Summer Associate
U.S. Government Accountability Office
May 2019 – August 2018

- Prepared memoranda for the International Affairs and Trade auditing team and internal ethics department.

Law Clerk
Public Defender Service for the District of Columbia, Trial & Appellate Divisions
January – April 2018

- Drafted motions, analyzed body cam footage, developed case strategy, observed trials, and attended litigation trainings.

Law Clerk
U.S. Senator Kamala D. Harris
August – December 2017

- Prepared legislative recommendations and decision memos for amicus curie brief sign-on requests; attended briefings and hearings on criminal justice and civil rights issues; and interacted with constituents.

Victories

Suppression
State of New Jersey v. Oswald, 2022 WL 148607, at *6 (App. Div. May 11, 2022) (ruling that the defendant was unlawfully arrested without probable cause where arresting officer relied on another officer's mistaken belief that probable cause existed to arrest the defendant for trespass and resisting arrest).

Trial Errors
State of New Jersey v. Basker, 2021 WL 2068924, at *4 (App. Div. May 24, 2021) (reversing terroristic threats convictions because the trial court incorrectly decided that the defendant's prior convictions would be admissible for impeachment under N.J.R.E. 609 if he testified).

State of New Jersey in the Interest of L.B., 2021 WL 1168389, at *5 (App. Div. Mar. 29, 2021) (reversing gun convictions because trial court wrongly denied the juvenile's adjournment request for additional time for his DNA expert to prepare for trial).

Sentencing
State of New Jersey v. Hamlet, 2022 WL 1787639, at *2 (App. Div. June 2, 2022) (remanding for resentencing where "inconsistent statements" from sentencing court about finding a mitigating factor caused "the sentencing transcript" to be "far from clear as to the judge's intent").

State of New Jersey v. Vanness, 2021 WL 1605124, at *8 (App. Div. Apr. 26, 2021) (vacating sentence because the trial court failed to: (1) address mitigating factors identified by defense and (2) assess defendant's ability to pay ordered restitution).

Other noteworthy decisions

*State of New Jersey v. Bailey***,** 251 N.J. 101 (2022) (finding error in trial court's retroactive admission of the defendant's text messages with her husband pursuant to the newly enacted crime fraud exception to the marital privilege, N.J.R.E. 509, but affirming because of overwhelming evidence supporting official misconduct convictions).

United States v. Cortez-Nieto, 43 F.4th 1034, 1053 (10th Cir. 2022) (J. Bacharach, concurring) (not "joining the lead opinion's discussion questioning the correctness of the district court's entry of an acquittal on the greater offense, and I would find instructional error. That error prevented the jury from considering how the witnesses' own possible guilt might have affected their credibility. Because the error was not harmless beyond a reasonable doubt, I would reverse the district court's judgment and remand for a new trial.").

United States v. Johnson, 46 F.4th 1183, 1189 (10th Cir. 2022) (holding that district court's error in omitting element of intent from jury instruction on constructive possession did not affect defendant's substantial rights (since there was evidence that the defendant was seated on the gun, he was in actual possession of the gun) and, thus, was not plain error in felon-in-possession trial); *see also United States v. Trujillo*, No. 21-1323, 2022 WL 17661046, at *4 (10th Cir. Dec. 14, 2022) (finding no plain error in felon-in-possession trial because the district court had implicitly determined that the defendant intended to possess the gun discovered on the floorboard of the driver's seat inside of the car he drove).

Howard University
Washington, DC 20039

Student No:@02828849

Date Issued:05-AUG-2021 OFFICIAL

Record of : Candace F Caruthers

Current Name:Candace F Caruthers

** Warning - No Address **

Issued To : CANDACE FAITH CARUTHERS

Course Level : Law

Current Program
Degree : Juris Doctor
Program : Juris Doctor
College : School of Law
Campus : West/Law

Degree Information:
Degree Awarded Juris Doctor 11-MAY-2019

Primary Degree
Program : Juris Doctor
College : School of Law
Campus : West/Law
Major:
Law
Inst. Honors:
Cum Laude

Subj	No.	C	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

Fall 2016
School of Law
Law
First-Time Professional

LAW	617	W	Torts	4.00	90	360.00
LAW	619	W	Civil Procedure I	4.00	88	352.00

Earned Hrs	GPA-Hrs	QPts	GPA
8.00	8.00	712.00	89.00

Spring 2017
School of Law
Law
First-Time Professional

LAW	612	W	Constitutional Law I	3.00	76	228.00
LAW	613	W	Legal Reasoning Research Writ	4.00	97	388.00
LAW	614	W	Property-Real	4.00	89	356.00
LAW	615	W	Contracts	5.00	86	430.00
LAW	616	W	Criminal Law	3.00	94	282.00

Earned Hrs	GPA-Hrs	QPts	GPA
19.00	19.00	1684.00	88.63

Fall 2017
School of Law
Law
First-Time Professional

LAW	621	M	Constitutional Law II	3.00	87	261.00
LAW	654	M	Legal Writing II	2.00	95	190.00
LAW	706	M	Externship	4.00	P	0.00

Earned Hrs	GPA-Hrs	QPts	GPA
9.00	5.00	451.00	90.20

Spring 2018
School of Law

Subj	No.	C	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:
Law
First-Time Professional

LAW	556	M	Equal. Emply. Opp. Law	3.00	88	264.00
LAW	642	W	Criminal Procedure I	3.00	91	273.00
LAW	687	W	Professional Responsibility	3.00	96	288.00
LAW	757	W	Advanced Externship Exp	2.00	P	0.00
LAW	774	M	CD:Legislative Clinic - Exp.	6.00	97	582.00

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	15.00	1407.00	93.80

Good Standing

Summer 2018
School of Law
Law
First-Time Professional

LAW	792	M	CD:Business Org	4.00	85	340.00

Earned Hrs	GPA-Hrs	QPts	GPA
4.00	4.00	340.00	85.00

Fall 2018
School of Law
Law
Continuing

LAW	629	M	Evidence	4.00	93	372.00
LAW	651	M	Wills Trust & Estates	3.00	88	264.00
LAW	655	M	Public Ethics Law	3.00	90	270.00
LAW	703	M	Trial Adv/Criminal Exp	2.00	94	188.00
LAW	819	M	CD: Bar Skills	2.00	P	0.00

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	12.00	1094.00	91.17

Good Standing

Spring 2019
School of Law
Law
Continuing

LAW	573	W	CD: Int'l Criminal Law	3.00	90	270.00
LAW	647	W	Family Law	3.00	94	282.00
LAW	760	W	Trial Advocacy/Civil Exp	2.00	P	0.00
LAW	771	M	CD: Commercial Law	3.00	95	285.00
LAW	805	W	Law Journal Senior Editors	5.00	P	0.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	9.00	837.00	93.00

Good Standing

Fall 2016

LAW	613	W	Legal Reasoning Research Writ	0.00	In Prog Course
LAW	615	W	Contracts I	0.00	In Prog Course

Fall 2017

LAW	774	M	CD:Legislative Clinic Exp	0.00	In Prog Course
LAW	805	M	Law Journal-2L	0.00	In Prog Course

Spring 2018

LAW	805	W	Law Journal-2L	0.00	In Prog Course

Fall 2018

ETRN

Registrar

Howard University
Washington, DC 20039

Student No:@02828849

Date Issued:05-AUG-2021 OFFICIAL

Subj	No.	C	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:							
LAW	805	M	Law Journal Sen.	0.00	In Prog	Course	

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	87.00	72.00	6525.00	90.63
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	87.00	72.00	6525.00	90.63

----------END OF TRANSCRIPT----------

Registrar

Candace Caruthers
University of Houston-Main Campus

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
US and Texas Constitution/ Poltics	Sorurbaksh	A-	3	
Logic I	Haaga	B	3	
Perspectives Cultural Studies	Gordon	A-	3	
General Biology	Snider	C	3	
Introduction to Liberal Studies	Behr	B	3	
University Chorus	Weber	A	1	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Core History	Curry	A-	3	
Physical Geology	Sisson	B+	3	
Intro to International Relations	Griffin	B-	3	
University Chorus	Mueller	A	1	
Beginning Karate	Kim	A	1	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Politics of Social Policy	Eckelman	A-	3	
University Chorus	Mueller	A	1	
Intro to Comparative Politics	Bagashka	W	0	
Intro to Political Theory	Knight	A	3	
Elementary Spanish II	Iglesias	B-	5	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law and Society	Jackson	A	3	
Intermediate Spanish I	Olivas	C+	3	
Race, Gender & Ethnic Politics	Hughes	A	3	
Sociology of Film	Curtis	A	3	
Sociology of Deviance	Colbert	A	3	
Intro to Public Policy	Hughes	A	3	

Dean's List

Summer 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Political Thought	Fuchs	B-	3
British Literature	McNamara	A	3

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intermediate Spanish II	Balestra	B	3	
Gov't Internship	Cross	A	3	
Social Class & Mobility in America	Lorence	B	3	
Intro to Social Work	Fitzpatrick	B+	3	
Sociology of Drug Use and Recovery	Colbert	B	3	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Independent Study	Cross	A	12	

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Selected Topics- Public Law and Adminstration	Jackson	A-	3	

HOWARD
UNIVERSITY

School of Law

June 12, 2023

To Whom It May Concern:

I am delighted to provide a recommendation on behalf of Candace Caruthers for a judicial clerkship. Ms. Caruthers has been a pleasure to teach, and I am sure that her charisma, strong work ethic, and positive attitude will be a great contribution to your chambers.

I initially met Ms. Caruthers during her first semester at Howard University School of Law, where I teach Legal Research and Writing. During the Fall of 2016, Ms. Caruthers was one of 25 students enrolled in my Legal Research and Writing I course. Ms. Caruthers regularly attended my lecture and actively participated in class discussions. I enjoyed witnessing Ms. Caruthers refine her craft throughout the year. I appreciated her eagerness to grow and implement feedback on one assignment to the next. In our conversations during her frequent visits to my office hours, Ms. Caruthers would identify cases or highlight potential issues that other students had not discovered. Ms. Caruthers, through her hard work and diligence, received a 97 and a CALI award for the highest grade in the class. Ms. Caruthers also excelled in my Legal Research and Writing II course where she continued to actively participate in class. Ms. Caruthers obtained a 95 in that course. I served as her advisor for her Journal note which was awarded the 2019 national Burton Award for Distinguished Writing in Law School. She successfully applied to become my Dean's Fellow in her third year, where she taught first year students citation and wholeheartedly invested in mentoring our students. She also diligently and timely graded all citations on various writing projects throughout the year for both 1Ls and 2L classes.

After three years of working closely with Ms. Caruthers, I recommend her highly and unequivocally. She was an exceptional and focused law student. People love working with her. Ms. Caruthers always conducts herself in a professional manner and has impressed me with her ability to relate to all types of people. I have the utmost confidence that Ms. Caruthers will make a positive contribution as a clerk in your chambers.

Regards,

Jasbir K. Bawa
Assistant Professor of Lawyering Skills
Howard University School of Law

2900 Van Ness Street, NW
Washington, DC 20008

Telephone (202) 806 8000
Facsimile (202) 806 8428
www.howard.edu

Candace Caruthers, Esq.
9123 East Mississippi Ave Apt 10-304, Denver, CO 80247 | Caruthers.Candace@gmail.com | (440) 452-7251

Writing Sample #1

This writing sample is the Brief I filed before the New Jersey Supreme Court in July 2021. In this Brief, I argue that the Court must reverse my client's official misconduct convictions due to the erroneous admission of the intimate text messages between her and her husband at her trial. Although my client's conversation with her husband occurred in 2014, the messages were admitted at her trial 2015, under the newly created crime-fraud exception to the marital privilege. In Point I, I argue that retroactive application of this new exception violated the State and Federal constitutional prohibitions against *Ex Post Facto* laws. In Point II, I argue that even if the Court grants retroactive application, because the text messages themselves did not seek to advance a joint, ongoing, or future criminal enterprise, the messages do not fall within the purview of the exception.

Suggestions from my supervising attorney and brief reviewer have been implemented, but all major edits and arguments in this Brief are my own.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 085342

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Certification Granted from a Final Judgment of the
Plaintiff-Respondent,	:	Superior Court of New Jersey, Appellate Division.
v.	:	
ASHLEY BAILEY,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Alvarez, J.A.D. Hon. Mitterhoff, J.A.D.
	:	
	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
P.O. Box 850
Trenton, NJ 08625
(973) 877-1200

CANDACE CARUTHERS
Assistant Deputy
Public Defender
Candace.Caruthers@opd.nj.gov
Attorney ID: 301772019

Of Counsel and
On the Brief

DEFENDANT IS CONFINED

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CONSTITUTIONAL PROVISIONS

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

For centuries, our judicial system has cherished and protected the right to marital privacy. Indeed, it is "a right of privacy older than the Bill of Rights - older than our political parties, older than our school system." One critical protection arising from this privacy right is the marital confidences privilege, which functions to foster trust and harmony between spouses by keeping their intimate communications private.

Until 2014, New Jersey's marital confidences privilege was essentially unqualified in criminal proceedings. In State v. Terry, 218 N.J. 224 (2014), however, this Court determined for the first time that a crime-fraud exception was necessary to balance the objectives of marital harmony and effective law enforcement. Adopted by the legislature in 2015, the crime-fraud exception as envisioned by this Court was narrow, applying only to communications that amounted to "collusion between spouses to advance a joint criminal enterprise."

This new exception is at the center of this appeal. During the summer of 2014, the marital privilege existed like it had for decades – with virtually no qualifications or exceptions. It was during this period that the defendant, Ms. Ashley Bailey, learned that she was the subject of an internal affairs investigation by her employer. In response, Bailey texted her

now deceased husband, Edwin Ingram, to express her doubts and fears and receive support and comfort in return. Bailey also reaffirmed her love for Edwin, confided in him that she was disappointed with herself, and expressed willingness to accept whatever consequences. When Bailey went to trial for official misconduct in 2015, the trial court erroneously admitted those messages pursuant to the new crime-fraud exception.

With this case, this Court must determine whether the trial court incorrectly granted retroactive application to the crime-fraud exception. In doing so, this Court must consider whether its crime-fraud exception altered an ordinary rule of evidence. Because the marital confidences privilege is necessary to promote human dignity, autonomy, and a democratic society, it cannot be deemed an ordinary rule of evidence. Moreover, since the privilege is firmly rooted in the rights against self-incrimination and privacy, it goes beyond merely impacting the conduct of trials, but seeks to effectuate fundamental constitutional rights. Due to its significant objectives and long-standing role of promoting one of society's most cherished relationships, retroactive application of the crime-fraud exception at Bailey's trial was erroneous.

And, even if this Court determines that the crime-fraud exception should receive retroactive application, this Court must also clarify the proper scope for how this new exception

should be applied. As it currently stands, the Appellate Division's opinion upholding the trial court's admission of the text messages significantly broadens the crime-fraud exception beyond the limitations set by this Court in Terry.

Marriage is the bonding of two people for life – for better or for worse. Because the marital confidences privilege seeks to preserve this precious union, it must not only protect communications relating to the best parts of life, but also our worst, when we are most in need a safe place to bear our conscious. Bailey's communication sharing her vulnerabilities, fears, and doubts with Edwin and reaffirming her love and devotion to him, embodied exactly what the confidences privilege seeks to protect. The marital privilege is unreasonably undermined by an exception that reaches so broadly as to expose the intimate thoughts and feelings Bailey shared with her life-partner for comfort during one of her worst seasons of life.

PROCEDURAL HISTORY

Defendant Ashley Bailey relies upon the Statement of Procedural History set forth in her Appellate Division brief (Db 2-4),[1] as supplemented herein.

In a per curiam opinion, the Appellate Division affirmed Bailey's convictions. State v. Ingram, Nos. A-2640-17T4, A-3157-17T4, 2021 N.J. Super. Unpub. LEXIS 41 (App. Div. Oct. 21, 2021). (Dpa 1-51). On May 11, 2021, this Court granted Bailey's Petition for Certification and leave for Bailey to file a supplemental brief. (Dsa 1).

[1] The following designations correlate to the briefs submitted in this appeal:
Db – Defendant's Appellate Division brief
Da – Appendix to defendant's Appellate Division brief
Dr – Defendant's Appellate Division Reply brief
Pb – State's Appellate Division brief
Dp – Defendant/Petitioner's Petition for Certification
Dpa – Appendix to defendant/Petitioner's Petition for Certification
Dsa – Defendant/Petitioner's appendix to this Supplemental Brief

STATEMENT OF FACTS

This appeal involves defendant-petitioner, Ashley Bailey's, conviction for two charges of official misconduct in her former role as a Camden County police officer. The underlying indictment charged 34 defendants in 103 counts, with a variety of crimes relating to a narcotics distribution network operating in Camden. (Da 1-105) The State theorized that Bailey's recently deceased husband, Edwin Ingram, who passed away before trial, was the leader of this narcotics distribution network. (9T 265-14 to 266-8) Ultimately, however, Edwin was indicted only for conspiracy and third-degree CDS charges, and trial testimony revealed that suspicions about his involvement as a leader of the network could not be verified with any actual proof. (10T 44-4 to 45-12, 49-5 to 50-14, 265-14 to 266-8) The State further alleged in a single count that Bailey used her role as a police officer to benefit the drug distribution network, but the jury acquitted Bailey of conspiracy to distribute drugs. (4T 30-12 to 17; 12T 36-4 to 22; Da 5, 106-108)

With respect to the charges of official misconduct, in one count, the State alleged that Bailey sought to purposefully confer a benefit on herself and the conspiracy by accessing the police database thirteen times to read reports pertaining to her husband and other individuals who were indicted in the conspiracy. (4T 30-12 to 17, 34-1 to 6; 11T 106-1 to 4, 109-22

to 24) For the second count of official misconduct, the State alleged that Bailey told her husband what she learned during a contrived intelligence briefing to benefit the conspiracy. (11T 113-1 to 116-11) In response, the defense argued that all of the State's evidence was speculative, that Bailey did not act to confer any benefit on the conspiracy, and that the State's evidence did not show guilt beyond a reasonable doubt. (11T 67-1 to 21, 69-2 to 7, 72-25 to 74-19)

Significantly, because the State relied on a text message exchange between Bailey and her husband, Edwin, to prove its allegations of official misconduct, this Court must consider the crime-fraud exception to the marital confidences privilege. (6T 163-17 to 21; 10T 76-19 to 79-15; 11T 69-2 to 8)

Bailey and Edwin Ingram met in high school in 2003 and were married in 2011. (6T 116-8 to 10, 131-18 to 22; 10T 107-13 to 17) The couple was married for five years before Edwin's untimely passing, about two years after the conclusion of the investigation in this case. (10T 133-4 to 134-1) During their relationship, Bailey and Edwin had two children together. (6T 132-14 to 17) Bailey joined the Camden police years after marrying Edwin and readily disclosed to them that Edwin had a criminal history. (10T 112-13 to 113-25)

Like any, Bailey and Edwin's marriage was not perfect. In an interview with police on October 28, 2014, the day Bailey was

arrested, she willingly and candidly described her relationship with Edwin. (6T 131-18 to 134-7) Bailey explained that because Edwin did not contribute financially, she struggled with paying the bills and paying her property taxes; even admitting that, at the time of her arrest, she was living without electricity. (6T 128-1 to 5) Bailey also feared that Edwin might be involved in criminal activity and desperately wanted him to stop, so she would occasionally kick Edwin out of the home or take the children and stay with her parents. (6T 133-4 to 22) Yet, because Bailey heavily relied on Edwin for his support with childcare when she went to work, she would often let Edwin back into the home to watch the children. (6T 132-6 to 13) Despite their challenges, Bailey consistently encouraged Edwin to do the right things, like getting a job and making something positive of his life. (6T 117-10 to 14)

Bailey also alleged that she was the victim of domestic violence. Bailey explained that Edwin would become violent with her whenever she would try to confront him about the people he associated with, specifically, his brother Nathan Ingram, and friend, Donyell Calm, whom she believed would get him in trouble. (6T 133-4 to 20) Bailey's hunch about Edwin's friends was ultimately correct; between May and October 2014, police engaged in series of undercover drugs buys with Nathan, Calm, and Lawrence Brown. (Db 5)

These undercover buys led to an expansive drug network investigation in which police monitored the phones of Nathan, Calm, Fidel Webb, and Kareem Anderson. (7T 53-2 to 58-20)

Bailey only became of interest to investigators because between June and July of 2014, she made 139 calls to Calm and several calls to Webb and Brown. (4T 25-16 to 19; 6T 112-9 to 15) Bailey explained that she made so many calls to Calm because she knew that he associated with her husband and she needed to get in touch with Edwin, who did not have a phone of his own. (6T 115-15 to 20; 124-22 to 125-3) Bailey explained that Edwin would often go missing and during those times, if something had happened to one of her children, she would have no way of getting in touch with him directly. (6T 127-6 to 11) So, whenever Bailey needed Edwin, she called any numbers she could and kept calling until she could reach him. (6T 119-25 to 120-8). The State's theory that Bailey was connected to drug conspiracy was largely speculative, in all of the texts and calls that were monitored, none directly implicated her in the conspiracy. (6T 226-6 to 10; 12T 36-4 to 22; Da 106-108)

In September 2014, the Camden police initiated an internal affairs investigation into Bailey. (8T 11-10 to 18) The investigation determined that Bailey had accessed their internal system thirteen times and pulled reports regarding Calm, Edwin, and Webb, with the majority of the reports she accessed

pertaining to her husband. (8T 12-21 to 13-1) The reports pertained to various arrests and interviews involving unrelated matters between 2012 and 2014 and none discussed the ongoing police investigation into the alleged drug distribution network. (4T 31-25 to 32-8; 8T 15-23 to 25-18)

In her interview with police, Bailey denied any involvement with drug distribution or any knowledge of the drug investigation. (6T 113-13 to 14) Bailey willingly admitted to accessing the database and explained that she only accessed the reports on LEAA in order to verify whether her husband really was staying away from Calm, Anderson, and Webb, as he had promised. (6T 101-19 to 21, 109-9 to 14) Bailey knew that the database logins were tracked, and she made no effort to hide her actions, as such database queries were routine in the Department. (10T 125-17 to 128-8) None of the accessed reports were printed or otherwise duplicated. (8T 78-21 to 79-5)

As a consequence of the information learned from the internal affairs investigation, police set up a contrived intelligence briefing for Bailey to learn supposedly confidential information about Calm concerning recent shootings to "specifically see what she would do with that." (4T 198-20 to 23). After the briefing, Bailey went home for two minutes and confronted Edwin about his involvement with Calm and urged Edwin to stop associating with Calm because he was being investigated.

(6T 138-3 to 10) Bailey testified that she did not disclose the contents of the briefing to Edwin but asked Edwin if he knew anything about the shootings and he denied knowledge. (10T 138-17 to 142- 21; Da 41-48). Bailey explained that she only sought to hold Edwin accountable and did not intend to aid drug distribution or Calm in any way. (6T 143-16 to 19; 11T-68-22 to 69-8)

Following Bailey's arrest, police seized her phone and searched it pursuant to a communications data warrant. (7T 59-1 to 4) The search revealed the following text message exchange from September 16, 2014, which was admitted at Bailey's trial under the newly created crime-fraud exception to the marital privilege:

> FEMALE: Don't get yourself all worked up. It's nothing you can change about it, if it's done. We had our chance, even me, to throw in the towel . . . and get free of it all. And I chose you, so I chose my fate. Shit happens. I guess it was just in God's plan. I'm stressed, but it's nothing I can change.
>
> MALE: It ain't nothing. Don't worry about it. As long as you're not a crooked cop, we'll be good.
>
> FEMALE: That's not true. There's more to it than that. I tried so many times to explain how much more that included, but I chose to be here, so I am just as responsible. I promised myself that I wouldn't make it here, but what can I do about it?
>
> MALE: It ain't even nothing. People just talking. You off?

FEMALE: They talking and they thinking up a plan, babe. But no worries. I'm relieved they foo[sic] what I couldn't. A good plan.

MALE: How long you going to be out?

FEMALE: You're not going to believe what I was just told . . . tonight.

MALE: What?

FEMALE: It's true.

MALE: How did that happen?

FEMALE: One of the guys working with L3 Narc. Fuck, fuck, fuck. How did I fucking get here? WTF? I am so fucking disappointed with myself. I am so fucking stressed now.

MALE: What? They know nothing.

FEMALE: I don't know what he knows. It's time for me to brace myself. I accept what's for me. I accepted that when I chose you. We chose each other and I'm ready for that battle. I don't care. I chose to love and that's all that matters. You love me and I love you, so let them bring me what I knew would come someday.

MALE: We gonna be good. Let them watch.

FEMALE: I know. If not, we still got each other and that's good enough for me. It's time for you to choose, though. Choose to let us burn or choose to help us beat this. I can't make that decision for us. Look where it got us now. I could use a hug and a foot rub. You up for it?

MALE: I got us. Watch.

[(1T 13-18 to 15-6; 10T 76-19 to 79-15)

While the State argued that the messages proved that Bailey was disclosing confidential information to Edwin and showed consciousness of guilt, Bailey urged, and the jury found, that she had no involvement in any drug distribution. (10T 161-21 to 24; 11T 113-5 to 13; 12T 36-4 to 22; Da 106-108) At trial, Bailey testified that she said she was "disappointed with [herself]" because Edwin had told her that he had learned from another Camden police officer that internal affairs was investigating her. (10T 147-6 to 148-5) When Bailey said that they had their "chance . . . to throw in the towel . . . and get free of it all," she meant that they could have ended their relationship, but she had chosen to stay with her husband. (10T 148-17 to 149-5) Bailey testified that when she said that "there's more to it," than just not being a "dirty cop," she was referring to searching his name in the database, which Edwin did not know about. (10T 150-8 to 151-22) Also, Bailey explained that when she said, "it's true," she was referring to a statement from Lieutenant Hoffman who told her that Edwin was going to drag her down with him; Bailey believed that this confirmed what Edwin had told her about the internal affairs investigation and also suggested the police were investigating Edwin. (10T 161-21 to 24)

LEGAL ANALYSIS

Bailey relies on the arguments presented in her Appellate Division brief, as well as the arguments in her Petition for Certification, as supplemented herein.

POINT I

ERRONEOUS RETROACTIVE APPLICATION OF THE N.J.R.E. 509 (2)(E) CRIME-FRAUD EXCEPTION TO THE MARITAL CONFIDENCES PRIVILEGE VIOLATED THE EX POST FACTO PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

At Bailey's trial, the State was permitted to introduce a text message exchange between Bailey and her husband, Edwin Ingram, pursuant to the crime-fraud exception to the marital confidences privilege, which went into effect in November 2015. (1T 13-18 to 15-6; 10T 76-19 to 79-15); 2014 N.J. A.N. 3636. Because the crime-fraud exception did not exist in September 2014 when Bailey sent the messages to her husband, the admission of the confidential communications between Bailey and Edwin violated the constitutional ex post facto provisions, and thus, necessitates reversal of her convictions. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3. (10T 77-10 to 13)

The marital confidences privilege, unlike other evidentiary rules, is "an exclusionary rule based on the persistent instincts of several centuries." Hawkins v. United States, 358 U.S. 74, 79 (1958); Federal Marital Privileges in a Criminal Context: The Need for Further Modification Since Trammel, 43

Wash. & Lee L. Rev. 197 (1986) ("The defendant's privilege to prevent admission of his or her spouse's testimony at trial has existed in one form or another for roughly 400 years.") [hereinafter Marital Privileges in a Criminal Context].[2] The privilege "is founded upon the deepest and soundest principles of our nature," and serves to preserve the marital relationship, Stein v. Bowman, 38 U.S. 209, 223 (1839), which has been described as "the best solace of human existence." Trammel v. United States, 445 U.S. 40, 51 (1979). In this way, the privilege "personif[ies] the high regard in which American society holds individual rights, especially the right to privacy and belief in complete autonomy." Philip A. Elmore, "That's Just Pillow Talk, Baby": Spousal Privileges and the Right to Privacy in Arkansas, 67 Ark. L. Rev. 961, 973-74 (2014) [hereinafter Pillow Talk].

Accordingly, the marital confidences privilege as embodied in N.J.R.E. 509 preserves this societally cherished and time-honored union by keeping private those intimate and deeply personal communications shared between spouses. The privilege creates a safe haven or "zone of privacy" for married couples, affording spouses the opportunity to be truly vulnerable with each other and "enjoy their relationship without fear of their

[2] Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol43/iss1/10/.

inner thoughts, doubts, or wishes being shared with others." Pillow Talk, 67 Ark. L. Rev. at 975, 984.

The privilege derives from one of our nation's longest standing legal axioms: the principle that one must not be compelled to give testimony against himself. Marital Privileges in a Criminal Context, 43 Wash. & Lee L. Rev. at 201 n. 24; see also John Bergstresser, When Evidentiary Rules Enforce Substantive Policies: Same-Sex Marital Privilege Under Federal Rule of Evidence 501 in Diversity Cases, 46 New Eng. L. Rev. 303, 304 (2012) ("The marital privileges are deeply rooted in the common law and arise from two canons of medieval jurisprudence: that an accused could not testify on his own behalf due to his interest in the proceeding and that the husband and wife were one.") [hereinafter Marital Privilege as Substantive Policy]. While the self-incrimination justification for the privilege has diminished as society has afforded women independent legal status, it remains that the privilege effectuates marital harmony by respecting the union between spouses. See Trammel, 445 U.S. at 52-53.

The privilege is also deeply ingrained in the Fourth Amendment right to privacy, deriving from natural law and the humanistic rationale that our most intimate moments are worthy of protection. Marital Privileges in a Criminal Context, 43 Wash. & Lee L. Rev. at 210; Pillow Talk, 67 Ark. L. Rev. at 973-

74 ("Evidentiary privileges, such as the confidential marital communications privilege, personify the high regard in which American society holds individual rights, especially the right to privacy and belief in complete autonomy.").

Unlike the spousal testimonial privilege of N.J.R.E. 501(2), which has only been adopted in 31 states, all states recognize the marital confidences privilege in some form. Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 304; Pillow Talk, 67 Ark. L. Rev. at 971-72. The marital confidences privilege, which is relevant to this case, is distinguishable from the spousal testimonial privilege in a number of ways. Under the spousal testimonial privilege, "the witness-spouse alone has a privilege to refuse to testify adversely [against their spouse]; the witness may be neither compelled to testify nor foreclosed from testifying." Trammel, 445 U.S. at 53. In one way, the marital confidences privilege is narrower than the spousal privilege, which bars all testimony, because it only prevents the compelled disclosure of confidential communications shared exclusively between spouses. Mueller, et. al., §5.32 Marital Confidences Privilege, GWU Law Sch. Pub. L. Res. Paper No. 2018-67, 1 (2018). And, in another aspect, the marital confidences privilege is broader than the spousal testimonial privilege because it can be asserted in civil and criminal proceedings and continues even after the

marriage ends. Ibid. The few states that have not adopted a spousal testimonial privilege reason that the marital confidences privilege sufficiently protects marital harmony. Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 309. Overall, both privileges, "though doctrinally distinct, protect the fundamentally important relationship that is created through marriage." Ibid.

When the U.S. Supreme Court first presented its proposed language for the Federal Rules of Evidence to Congress, it included only a limited spousal testimonial privilege. §5.32 Marital Confidences Privilege, GWU Law Sch. Pub. L. Res. Paper No. 2018-67 at 1-2. This initial plan to omit a marital confidences privilege "prompted public outcry and contributed to the ultimate defeat of the proposed rules." Id. at 2. The debate resulted in present-day F.R.E. 501, which allows all privileges to be "governed by the common law — as interpreted by United States courts in the light of reason and experience." Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 304.

The privilege has persisted over centuries because marital confidences are regarded "as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." Wolfe v. United States, 291 U.S. 7, 14 (1934). In that manner, "[t]he role of privileges in evidence law is unique," since,

unlike other evidentiary rules that are concerned with "relevance or reliability" privileges are founded upon "public policy principles that are unrelated to ascertaining the truth." Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 307-08. The adoption of the marital privilege into our state's evidence rules was motivated by "the strong public policy of encouraging free and uninhibited communication between spouses, and, consequently, of protecting the sanctity and tranquility of marriage." State v. Szemple, 135 N.J. 406, 414 (1994).

In Wolfe, the Supreme Court further explained that because the marital privilege, like all other privileges, excludes relevant evidence from trial, it "should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved." Id. at 17. "Courts therefore accept privileges 'only to the extent that they outweigh the public interest' in the need for full disclosure." State v. Terry, 218 N.J. 224, 239 (2014) (citing Szemple, 135 N.J. at 413-14).

In Terry, reasoning that the public good was not served by safeguarding "conversations between spouses about their ongoing and future joint criminal behavior," this Court proposed a limited exception to the marital confidences privilege. Id. at 245. This Court acknowledged that a crime-fraud exception would "modify the Rules of Evidence in a significant way," but reasoned that such was necessary to strike the appropriate

balance between society's interest in safeguarding spousal communications and effective law enforcement. Id. at 239-40. This Court explained that it envisioned a crime-fraud exception that would still "encourage sharing of confidences between spouses and protect marital harmony and privacy," while no longer undermining effective law enforcement by "root[ing] out communications between spouses who are both involved in criminal activity." Id. at 244-45. However, because a crime-fraud exception would constitute a "fundamental change," with "serious and far-reaching consequences," this Court elected not to change the rule itself but recommended the revision to the Legislature for implementation. Id. at 243-44. "To be clear," this Court instructed that the exception would protect, "a confession made in confidence to an innocent spouse . . . but collusion between spouses to advance a joint criminal enterprise would not." Id. at 245 (emphasis added).

When the legislature ultimately adopted this exception in 2015, it explicitly incorporated this Court's guidance in Terry. 2014 N.J. A.N. 3636(1)(c). The resulting amendment created a narrow exception to the marital confidences privilege, applicable only in criminal cases, for communications relating to "an ongoing or future crime or fraud in which the spouses or partners were or are joint participants at the time of the communication." N.J.R.E. 509 (2)(e).

In this case, when Bailey engaged in private communications with her husband during the summer of 2014, the crime-fraud exception to marital confidences privilege did not yet exist. The trial court ruled that the intimate text messages between Bailey and her husband, Edwin Ingram, were admissible, nonetheless, because it incorrectly determined that the crime-fraud exception, which went into effect in November 2015, should receive retroactive application. (1T 13-18 to 15-6) In deciding that retroactive application was warranted, the court erroneously relied on State v. Rose, 425 N.J. Super. 463, 473 (App. Div. 2012), which granted retroactivity to the forfeiture by wrongdoing statute. (1T 13-18 to 14-15) The court thus admitted the text messages at Bailey's trial, following which Bailey was acquitted of conspiracy but was convicted of two counts of official misconduct. (Da 106-108)

The Appellate Division affirmed Bailey's convictions, reasoning that marital privilege was not intended to protect the planning or commission of crimes and should be construed narrowly. Ingram, slip op. at 36-37. The court further reasoned that the crime-fraud exception did not violate the ex post facto prohibition because it did not lower the quantum of evidence necessary to convict Bailey. Id. at 37. The Appellate Division also determined that Bailey was not prejudiced by the admission of the text messages because she was acquitted of conspiracy and

since the State had a sufficient factual basis for her official misconduct convictions. Ibid.

The trial court and the Appellate Division's rulings were incorrect. Unlike the evidentiary rule addressed in Rose, the 2015 crime-fraud exception did not change any "ordinary" procedural rule of evidence. As a long-standing evidentiary rule rooted in the fundamental rights to privacy and against self-incrimination, the Legislature's revision to this rule, which ultimately allows more testimony to be admitted at only criminal trials, offends the prohibition against ex post facto laws. Correspondingly, because of its historical roots in the fundamental rights embodied in the Fourth and Fifth Amendments, the marital privilege is analogous to a vested right in which Bailey reasonably expected to be protected, and, accordingly, retroactive application of the crime-fraud exception is fundamentally unfair. See, e.g., State v. Bey, 112 N.J. 45, 104 (1988) ("[A]part from the Legislature's intent concerning retroactivity, notions of fundamental fairness . . . would likewise demand retroactive application of the juvenile-offender exemption in this case."); State v. Abbatti, 99 N.J. 418, 420 (1985) ("Fundamental fairness can be viewed as an integral part of the right to due process. It may also be considered a penumbral right reasonably extrapolated from other specific constitutional guarantees. Regardless of its source, fundamental

fairness is a settled repository of rights of the accused.") (internal citations omitted).

A. Because the Marital Confidences Privilege is No Ordinary Rule of Evidence, the Crime-Fraud Exception Must Not Be Applied Retroactively.

Both the state and federal constitutions forbid the legislative branch from passing ex post facto laws. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3; State v. Fortin, 198 N.J. 619, 626-27 (2009). New Jersey's ex post facto jurisprudence follows the federal jurisprudence. State v. Perez, 220 N.J. 423, 438 (2015) (citing Fortin, 178 N.J. at 608 n.8). "The purpose of the Ex Post Facto Clauses is to guarantee that criminal statutes 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" State v. Muhammad, 145 N.J. 23, 56 (1996) (quoting Weaver v. Graham, 450 U.S. 24, 28-29 (1981)).

The Ex Post Facto Clause of the U.S. Constitution prohibits "'any statute which punishes . . . an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available . . . at the time when the act was committed.'" Id. at 438 (quoting Beazell v. Ohio, 269 U.S. 167, 169 (1925)). Historically, the ex post facto proscription has been applied to enactments that "take away or impair vested rights acquired under existing laws, or

create a new obligation, impose a new duty, or attach a new disability, in respect of transactions or considerations already past." Hughes Aircraft Co. v. United States, 520 U.S. 939, 947 (1997).

In order for a penal law to be ex post facto, a change in the law "'must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.'" Id. (quoting State v. Natale, 184 N.J. 458, 491 (2005) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). "'There is no ex post facto violation . . . if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" Id. at 438-39 (quoting Natale, 184 N.J. at 491 (internal citations omitted)) (emphasis in original).

In Carmell v. Texas, 529 U.S. 513, 522 (2000), the Supreme Court identified four types of laws that violate the Ex Post Facto Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
>
> 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.
>
> 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

> 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Here, retroactive application of the crime-fraud exception violates the fourth principle. By exposing communications between spouses that previously would have remained private, the crime-fraud exception "alters the legal rules of evidence" and allows more evidence to be presented to the factfinder. Essentially, by altering a centuries-old legal protection, the legislature impaired Bailey's right to privacy in her marital communications and disadvantaged her against the State, who exclusively benefits from the crime-fraud exception. Pillow Talk, 67 Ark. L. Rev. at 970 ("With respect to the confidential marital communications privilege, the humanistic justification recognizes that married couples have a right to privacy in their discussions, and such intimate speech should be beyond reach. Commentators have intimated that any intrusions into the marital confidences of a couple offend the couple's right to privacy.").

Moreover, this Court should not grant retroactivity to the crime-fraud exception because the marital privilege is not a mere procedural rule. Scholarship has distinguished "pure rule[s] of procedure," i.e., those "concerned solely with accuracy and economy in litigation," from privileges, which are

not at all concerned with these objectives. Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 314, 318 (examining the "deceptively simple" distinction between procedural and substantive laws at the "heart" of the Erie doctrine and arguing that the marital privilege is a substantive law). Unlike purely procedural rules, privileges function to promote societal values and in application, "stand in the way of an efficient truth-seeking process by preventing otherwise relevant information from being disclosed." Id. at 323-24. Because the marital privilege promotes human dignity by safeguarding marital communications, it plays a critical role in our democratic society that goes far beyond merely impacting "modes of procedure and the conduct of trials," Rose, 452 N.J. at 468. Accordingly, the marital privilege is not a simple procedural rule of evidence. Because the marital privilege embodies such important ideals, the legislature's revision to the privilege had a significant impact on Bailey's rights and privileges, making retroactive application of the exception unfair.

Further, unlike the forfeiture by wrongdoing statute that was granted retroactivity in Rose, the crime-fraud exception was not an "ordinary" change to the marital privilege. See id. at 472. In Rose, the Appellate Division reasoned that those evidentiary laws that allow for more evidence are not banned entirely because "rules of that nature are ordinarily

evenhanded." Id. at 470. The court explained that there would be "no unfairness or injustice in applying" the forfeiture by wrongdoing statute retroactively because it could be used to benefit the defense or the state, was an ordinary rule of evidence, and it "reflect[ed] long-standing legal and equitable principles that were well recognized at the time of the charged offenses." Id. at 472-73.

Rose also relied on State v. Muhammad, 145 N.J. 23, 57 (1996), in which this Court granted retroactivity to the victim-impact statute, N.J.S.A. 2C:11-3(c)(6). Rose, 425 N.J. Super. at 472. In Muhammad, this Court explained that it granted retroactivity because the new provision "simply modified the scope of evidence that may be admitted during the penalty phase of a capital case and did not alter any substantive rights of defendant." Muhammad, 145 N.J. 23 at 57. This Court also explained that it would not be unfair to apply the new law retroactively because "much victim impact evidence is already admitted into evidence in the guilt phase." Id. at 58.

Here, however, unlike in Rose and Muhammad, retroactive application would result in unfairness. Distinguishable from the victim-impact statute in Muhammad, the marital confidences privilege is derived from the fundamental rights to privacy and against self-incrimination and so the crime-fraud exception alters substantive rights. Additionally, the crime-fraud

exception is distinguishable from the victim-impact statute in Muhammad because that provision only slightly increased the amount of evidence that became admissible and concerned evidence that would have eventually been presented to the jury regardless. The crime-fraud exception, however, allows for an entirely new form of evidence to be admitted that would have been otherwise entirely excluded from the judicial process.

Further, as this Court recognized in Terry, the crime-fraud exception constituted a "fundamental change," to the marital privilege, which has persisted for centuries. In New Jersey, the marital privilege has only ever been qualified by the type of proceeding in which it may be invoked. See N.J.R.E. 509(2). Since its enactment, however, the privilege has never limited the content spouses could freely share with each other. Ibid.; see also Terry, 218 N.J. at 224 (acknowledging that the marital confidences privilege at that time "immunizes conversations between spouses about their ongoing and future joint criminal behavior"). Thus, unlike the law in Rose that implemented a change consistent with historically equitable principles, the marital privilege has consistently protected all spousal communications, regardless of the topic, for centuries. By applying this significant change retroactively, the court impermissibly denied Bailey of her right to have fair warning about changes in the laws.

The Appellate Division was also incorrect in finding that Bailey was not prejudiced by the admission of these text messages. Ingram, slip op. at 37. The State's entire theory was that Bailey's "purpose in accessing these reports was the benefit to her and to the drug trafficking organization," and used the texts as evidence of Bailey's purposeful intent. (11T 109-21 to 24); see also 4T 34-1 to 6); see generally N.J.S.A. 2C:30-2 (providing that official misconduct occurs when "[a] public servant" acts with "purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit") The State claimed that the messages showed her purposefulness because it showed that "she chose love, she chose her husband over her job, over her badge. And any benefit to her husband is clearly a benefit to her under those circumstances." (11T 113-1 to 13) Because the State claimed that the messages "clearly show[ed] [Bailey's] intent" which was necessary to find her guilty of official misconduct, it cannot be the Bailey was not prejudiced by the erroneous admission of these text messages. (135-22 to 138-5)

Further, Bailey contested that she had a purposeful intent and claimed that any disclosure about the intelligence briefing would have been done accidentally, in the heat of the moment. (6T 163-17 to 21; 11T 69-2 to 8) And the evidence for the database searches were inextricably linked with the intelligence

briefing because the briefing was "designed and given" to Bailey only as a result of the suspicions that arose after the police learned about her database searches. (5T 198-20 to 23, 219-22 to 220-5; 6T 248-12 to 17; 8T 12-21 to 13-1)

Bailey was also acquitted of conspiracy, suggesting that the jury had reservations generally about the State's proofs. (12T 36-4 to 22; Da 106 to Da 108). It is significant then that the State's theory of guilt for the database search and intelligence briefing was premised on its belief that the text messages proved that Bailey was acting purposefully to benefit the conspiracy, which jury indicated that it did not believe Bailey took part in. (l0T 161-21 to 24; 11T 113-5 to 13) The text messages were the only evidence admitted at trial from which the jury could even possibly (albeit incorrectly) infer such an intent.

Notably, there was no direct proof that Bailey was involved in the conspiracy; all the State's evidence that Bailey was somehow associated with Calm, or any of the other actors was speculative. (4T 30-12 to 17; 11T 109-21 to 24) There was also no direct evidence that Bailey had provided any information she accessed to her husband. (6T 73-13 to 25) Accordingly, because the erroneous admission of these text messages "had the clear capacity to tip the scales against defendant," Bailey was denied a fair trial by the erroneous introduction of these text

messages and reversal is necessary. State v. Garcia, 245 N.J. 412, 437 (2021) (ruling that the trial court's erroneous ruling excluding a cell phone video denied defendant a fair trial because it supported the defendant's self-defense claim).

B. Because the Marital Confidences Privilege is Derived from the Fundamental Rights to Privacy and Against Self-Incrimination, it is Analogous to a Vested Right.

In Rose, 425 N.J. Super. at 468, the Appellate Division provided that "[n]ew rules relating only to modes of procedure and the conduct of trials, in which no one can be said to have a vested right, apply if they are in effect at time of trial, regardless of when the underlying crime was committed." The court then reasoned that retroactivity was appropriate because "defendant can point to no vested interest in being tried by rules of evidence in effect at the time the crime was committed as opposed to time of trial, namely, in being tried without evidence of wrongdoing in the procurement of an adverse witness unavailability, simply because the wrongdoing preceded the effective date of the rule." Id. at 473.

With this case, this Court has the opportunity to rule that the marital confidences privilege, because it is founded in fundamental constitutional rights, is more akin to a vested right than an ordinary rule of evidence. Even if defendants may not have a vested right in evidentiary rules, each is constitutionally guaranteed their fundamental rights. See, e.g., State v. Hunt, 91 N.J. 338 (1982) ("The historical roots of the Fourth Amendment centered about protection from unwarranted intrusions into the home. This privacy interest in the home . . . has continued unabated throughout our judicial history.")

(emphasis added); State v. Thompson, 142 N.J. Super. 274, 281 (App. Div. 1976) ("The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts."). And, as previously discussed at length, the marital privilege is a core component of the privacy rights enjoyed by our society; even the seminal case articulating the right to privacy concerned the marital relationship. Pillow Talk, 67 Ark. L. Rev. at 974-77; Griswold v. Connecticut, 381 U.S. 479, 486-87 (acknowledging marital right to privacy because "the very idea of allowing the police to search the sacred precincts of marital bedrooms . . . is repulsive to the notions of privacy surrounding the marriage relationship") (emphasis added). Because all criminal defendants are guaranteed their fundamental rights, it is evident that the marital confidences privilege, which embodies the fundamental right to privacy, functions similar to a vested right. See Vested Right, Ballentine's Law Dictionary (2010) ("An immediate fixed right of present or future enjoyment[.]").

Due to the unique nature of certain evidentiary privileges that seek to preserve fundamental rights -- see, e.g., N.J.R.E. 501 (privilege not to testify for the accused in the criminal context); N.J.R.E. 503 (privilege against self-incrimination) -- this Court should rule that the marital confidences privilege is not merely a "rule relating only to modes of procedure and the conduct of trials." Rose, 425 N.J. Super. at 468. This Court

should recognize the important role these privileges have in our society by distinguishing evidentiary privileges from purely procedural rules and deciding that privileges should be treated like vested rights in the retroactivity analysis. See also Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 327 ("The marital privileges . . . are different than most other evidentiary rules. Rather than effectuating a truth-seeking purpose, they act to effectuate other policy goals unrelated to ascertaining the truth. These privileges recognize the fundamentally unique nature of the marital relationship, and the necessity to be able to confide completely in your life partner without fear that these confidences will later be exposed in court.") (emphasis added).

As demonstrated by Terry, there are often good reasons to differentiate treatment of evidentiary rules. 218 N.J. 241 (distinguishing between evidence rule changes "of lesser consequence" and those "that dramatically impact the conduct of trials"). Finding the marital privilege analogous to a vested right is consistent with the important role the marital privilege has in society. The current ex post facto test only considers whether a rule is procedural or a vested right, even though our evidence rules are much more complex than that. In order to effectuate the principles of fairness embodied in the ex post facto clauses, it is necessary for this Court treat the

marital confidences privilege as it does vested rights. Principally, retroactivity is inappropriately applied to changes to the marital privilege because its "primary function is to influence behavior in everyday life" not simply the procedure of trials. Marital Privilege as Substantive Policy, 46 New Eng. L. Rev. at 324. And, due to the significant role the marital confidences privilege plays in effectuating society's ideals of human autonomy and dignity, retroactive application in this case is fundamentally unfair. See, e.g., Bey, 112 N.J. at 104.

POINT II

ALTERNATIVELY, BECAUSE THE COMMUNICATIONS BETWEEN DEFENDANT AND HER HUSBAND DID NOT AIM TO ADVANCE A JOINT, ONGOING, OR FUTURE CRIME, THE TEXT MESSAGES DO NOT FALL WITHIN THE N.J.R.E. 509(2)(E) CRIME-FRAUD EXCEPTION.

Alternatively, even if this Court determines that the crime-fraud exception should be applied retroactively, reversal is necessary because the messages exchanged between Bailey and her husband did not fall within the crime-fraud exception. In the text messages Bailey sent to her husband Edwin after learning about her employer's internal investigation into her, she expressed fear and disappointment in herself and sought out Edwin for solace and support. (10T 147-2 to 20). Because their conversation did not pertain to any offense alleged to be ongoing or committed by Edwin and Bailey jointly, the messages could not fall within the crime-fraud exception. Moreover, because the messages signified the "well-settled public policies," underlying the marital privilege of "encourage[ing] spouses to share confidences and [] protect[ing] marital harmony and privacy," Terry, 218 N.J. at 229, the Appellate Division's interpretation of the exception has impermissibly expanded the crime-fraud exception beyond what was envisioned by Terry. The erroneous admission of these private messages denied Bailey a fair trial and necessitates reversal of her convictions. U.S. Const. amends. VI; XIV; N.J. Const. art. I, ¶¶ 1, 9, 10, 11.

As previously mentioned, in Terry, 218 N.J. at 241, this Court concluded that a crime-fraud exception to the marital confidences privilege would be the best way to balance society's interests in marital privacy and attaining justice. Because this Court recognized the exceptional qualities of the marital privilege, however, it recommended that the new exception be enacted by the Legislature. Id. at 243-44. This Court also provided clear parameters for how it intended the crime-fraud exception to operate: "a confession made in confidence to an innocent spouse would remain confidential, but collusion between spouses to advance a joint criminal enterprise would not." Id. at 245 (emphasis added).

When the Legislature implemented the crime-fraud exception, it specifically incorporated the Terry opinion. 2014 N.J. A.N. 3636(1)(c). In the law's accompanying statement, its sponsor, Senator Nicholas P. Scutari, also explained that the bill was amending the Evidence Act "in accordance with the New Jersey Supreme Court's proposal." Statement to S. 2411, 216th Leg. (Sept. 2014).[3] Enacted in 2015, the revised statute eliminates the privilege "in a criminal action or proceeding if the communication relates to an ongoing or future crime or fraud in which the spouses or partners were or are joint participants at

[3] Available at: https://www.njleg.state.nj.us/2014/Bills/S2500/2411_I1.HTM.

the time of the communication." N.J.R.E. 509(2)(e); see 2014 N.J. A.N. 3636. Since its enactment, the new exception has only been interpreted by the Appellate Division in this case. See Ingram, slip op. at 34-37.

The primary goal of statutory interpretation is to "determine the meaning of the statute . . . by looking to the Legislature's plain language." State v. Regis, 208 N.J. 439, 447 (2011). Thus, courts must begin by ascribing "the terms used therein their ordinary and accepted meaning." State v. Shelley, 205 N.J. 320, 323 (2011). Courts should also interpret the words and phases of a statute not in isolation, but instead, in "their proper context" to avoid "read[ing] one part of a statute in a way that would render another part redundant or even absurd." State v. Rangel, 213 N.J. 500, 509 (2013).

Here, the plain language of the legislation reveals that the statute should not be applied, as it was here, to conversations in which spouses simply reference alleged, past wrongdoing. To lose its protected status, the confidential communications must "relate" to an "ongoing" or "future" crime "jointly" committed by the spouses. N.J.R.E. 509. To relate means "to show or establish logical or causal connection

between."[4] An activity is ongoing when it is "actually in process" or continuously moving forward."[5] Future is "a verb tense expressive of time yet to come" or "existing or occurring at a later time."[6] When used an adjective, joint means "united," "combined," or "common to two or more: such as involving the united activity of two or more."[7]

Thus, to fall under purview of the exception, the communication must have a causal connection to an offense that is the consequence of a couple's united activity that is either actually in process or will take place at a later time. Even by its plain meaning, the exception could not be properly applied to a conversation in which a spouse simply confides in their partner about their own criminal involvement; the communication itself must have a causal connection to the ongoing or future crime the spouses are alleged to be committing together. Also,

[4] Relate, Merriam-Webster's Dictionary, available at: https://www.merriam-webster.com/dictionary/relate (last visited July 19, 2021).

[5] Ongoing, Merriam-Webster's Dictionary, available at: https://www.merriam-webster.com/dictionary/ongoing (last visited July 22, 2021).

[6] Future, Merriam-Webster's Dictionary, available at: https://www.merriam-webster.com/dictionary/future (last visited July 22, 2021).

[7] Joint, Merriam-Webster's Dictionary, available at: https://www.merriam-webster.com/dictionary/jointly (last visited July 22, 2021).

by its plain meaning, the exception cannot be applied to completed conduct because logically, completed conduct cannot also be in process, moving forward, or yet to come.

In this case, the court failed to hold a N.J.R.E. 104(a) hearing to determine whether the crime-fraud exception applied to the specific text messages the State sought to admit. Too Much Media, LLC v. Hale, 413 N.J. Super. 135, 149 (2010) ("[W]here there are contested issues of material fact as to the existence of the conditions precedent to assertion of the privilege, there should be a full preliminary hearing to decide whether all the requirements of the [privilege] have been met."); see also Rose, 425 N.J. at 473 (explaining that its retroactivity determination "in no way suggests any view as to whether the evidence the State seeks to admit meets the criteria of the forfeiture-by-wrongdoing rule. That determination, of course, must await a N.J.R.E. 104(a) hearing[.]") (emphasis added). When a court fails to conduct a preliminary hearing to make the necessary findings, its rulings are not entitled to deference. See State v. Sims, 466 N.J. Super. 346, 372 (App. Div. 2021) ("We review an evidentiary hearsay ruling under the abuse of discretion standard but afford no deference to questions of law, such as those interpreting constitutional rights.")

At Bailey's trial, after incorrectly deciding that the crime-fraud exception should receive retroactive application, the trial court stated that it was unclear exactly which of the thousands of text messages that the State had obtained would actually fall within the parameters of crime fraud exception. (2T 13-18 to 14-15) Without making any findings, the court expressed that it was satisfied that the State had shown that "some of these texts fall within the exception." (2T 16-5 to 9) The court also displayed a fundamental misunderstanding of the strict requirements of the exception when it reasoned that the statements were likely admissible because they merely "deal with criminality." (2T 18-6 to 15) The State ultimately never demonstrated that the text messages it admitted satisfied the requirements of the crime-fraud exception and the court never made any findings on whether these communications satisfied the elements of the exception. (See 10T)

Accordingly, the following text exchange between Bailey and Edwin on September 16, 2014, was read aloud to the jury by female and male investigators:

> FEMALE: Don't get yourself all worked up. It's nothing you can change about it, if it's done. We had our chance, even me, to throw in the towel . . . and get free of it all. And I chose you, so I chose my fate. Shit happens. I guess it was just in God's plan. I'm stressed, but it's nothing I can change.

MALE: It ain’t nothing. Don’t worry about it. As long as you're not a crooked cop, we’ll be good.

FEMALE: That's not true. There’s more to it than that. I tried so many times to explain how much more that included, but I chose to be here, so I am just as responsible. I promised myself that I wouldn’t make it here, but what can I do about it?

MALE: It ain’t even nothing. People just talking. You off?

FEMALE: They talking and they thinking up a plan, babe. But no worries. I’m relieved they foo[sic] what I couldn't. A good plan.

MALE: How long you going to be out?

FEMALE: You’re not going to believe what I was just told . . . tonight.

MALE: What?

FEMALE: It’s true.

MALE: How did that happen?

FEMALE: One of the guys working with L3 Narc. Fuck, fuck, fuck. How did I fucking get here? WTF? I am so fucking disappointed with myself. I am so fucking stressed now.

MALE: What? They know nothing.

FEMALE: I don’t know what he knows. It’s time for me to brace myself. I accept what’s for me. I accepted that when I chose you. We chose each other and I’m ready for that battle. I don’t care. I chose to love and that’s all that matters. You love me and I love you, so let them bring me what I knew would come someday.

> MALE: We gonna be good. Let them watch.
>
> FEMALE: I know. If not, we still got each other and that's good enough for me. It's time for you to choose, though. Choose to let us burn or choose to help us beat this. I can't make that decision for us. Look where it got us now. I could use a hug and a foot rub. You up for it?
>
> MALE: I got us. Watch.
>
> [(10T 76-19 to 79-15)]

In affirming Bailey's convictions, the Appellate Division echoed the trial court's fundamental misunderstanding of the exception's limited scope by reasoning that the exception applied "because the exchanges reflected Bailey's concern about her role in the context of the ongoing investigation into the still operational drug organization and the potential effect it would have on the balance of her life." Ingram, slip op. at 36-37, 51. Essentially, the Appellate Division held that communications that merely mention criminality or wrongdoing lose their protected status. The Appellate Division's ruling was improper because it is in direct conflict with Terry, 218 N.J. at 245, which explicitly determined that the primary purpose of the crime-fraud exception was not to keep a criminally involved spouse from confessing or discussing what they may have done with their spouse, but to avoid the unintended consequence of immunizing communications between spouses which seek to advance criminal activity.

The glaring inconsistency between this Court's envisioned function for the crime-fraud exception and the trial court's and Appellate Division's rulings is illustrated by the underlying facts of Terry. The communications at issue in Terry were text messages and phone calls between co-defendant spouses in which the husband twice asked his wife to pick up drugs for him. Id. at 230. In these exchanges, the husband sought out his wife to advance his drug distribution, making them joint participants in the conspiracy. Ibid. These communications are starkly distinguishable from this case because neither Bailey nor her husband requested assistance from the other with effectuating any criminal act.

Thus, pursuant to Terry, it was incorrect for the Appellate Division to uphold the trial court's ruling simply because the messages "reflected" Bailey's "concern about her role," and for the trial court to justify admission of the messages because they "deal with criminality." Ingram, slip. op. at 36-37; (2T 18-6 to 15) It was also improper for the Appellate Division to justify the admission of the messages because they pertained to "the potential effect [the drug organization] would have on the balance of her life," since it is not an ongoing or future crime to confide in your spouses about your fears and worries.

Not only is it lawful to share these confidences with your spouse, but it is exactly what the marital privilege aims to do.

See Marital Privileges in a Criminal Context, 43 Wash. & Lee L. Rev. at 212, 219 ("The common-law justification of fostering marital privacy through invocation of the confidential communications privilege encourages spouses to be frank and open with one another. Courts, therefore, should not penalize a defendant for seeking solace in defendant's marriage partner by revealing his conscience.") (emphasis added). Because the conversation fell short of Bailey asking Edwin to help her do something illegal and only involved Bailey expressing concerns that she might be in trouble, the communications did not advance any alleged misconduct and must retain their privileged status.

Critically, by contradicting Terry's guidance, the Appellate Division has impermissibly broadened the scope of the crime-fraud exception far beyond that contemplated by this Court in Terry. As interpreted by the Appellate Division, the crime-fraud exception improperly infringes upon Bailey's right to seek solace from her spouse at her lowest point when she needed him most, reaffirm her love and commitment to him, and mentally process the immense fear and doubt she was experiencing.

The reasoning of the trial court and Appellate Division was also fundamentally flawed because the communications between Bailey and Edwin did not relate to a joint or ongoing offense. See, e.g., United States v. Wood, 924 F.2d 399, 401-02 (1st Cir. 1991) (finding that crime-fraud exception would not apply to

incriminating letter sent by husband to wife because it "was written after both spouses' arrests and, consequently, after the conclusion of the alleged conspiracy between them"). In United State v. Estes, 793 F.2d 465, 466 (2d Cir. 1986), the Second Circuit demonstrated the careful manner in which courts should scrutinize the facts to determine the precise moment when and if a spouse becomes "part of an ongoing joint criminal activity." In Estes, the State admitted communications between a defendant-husband and his wife to prove charges related to a theft. Id. at 466. In the most damning communication, the husband admitted the theft to his wife and told her that he had taken the money from an armored car service. Ibid. The court reasoned that because at that point the husband's theft had been completed, the wife had no part in the theft and that communication had been inappropriately admitted at the husband's trial. Ibid. The court, however, upheld the admission of communications between the husband and wife that occurred after she knew the theft had taken place and she actively assisted him in counting, hiding, and laundering the money. Ibid.

Here, the text messages did not advance any joint or ongoing crime. First, regarding the conspiracy to distribute CDS charge, the messages were not admissible on the basis that they related "to the still operational drug organization," because Bailey did not act jointly with Edwin in advancing any drug

distribution. Ingram, slip op. at 37. The trial court made no findings, and the State advanced no reasons why these messages related to CDS distribution. Even at trial, the State only claimed that the messages showed consciousness of guilt and that Bailey had been disclosing confidential information to Edwin, not that the messages contained any requests to help with selling drugs. (11T 137-22 to 138-12) To the extent that the State argued that the messages showed that Bailey had previously become aware of the drug distribution investigation, this could not justify application of the crime-fraud exception since it would have happened in the past, and thereby, did not show that Bailey had an ongoing or future role in selling drugs. (11T 138-6 to 12) Significantly, Bailey's lack of involvement in drug distribution was fully embraced by the jury, who acquitted Bailey of the conspiracy charge. (12T 36-4 to 22; Da 106-108)

Next, any alleged official misconduct could not have been committed jointly with Edwin because Bailey alone was a police officer who could "commit an act relating to [her] office." N.J.S.A. 2C:30-2(a) (official misconduct). Moreover, each time that Bailey supposedly accessed the police database, she did not do so jointly with Edwin, but alone, in her police car. (6T 154-2 to 5; 7T 101-14 to 102-20) And the alleged misconduct of accessing the databases was no longer ongoing when the messages text messages were sent, since Bailey only accessed the database

on June 10 and 19, 2014, and the text message exchange occurred several months later on September 16, 2014. (7T 16-5 to 25-18; l0T 77-2 to 79-15)

The State also alleged that Bailey was committing official misconduct by telling her husband about the briefing with Calm. (Da 78) Yet this alleged crime was not ongoing at the time of the messages because the briefing occurred several months later on October 23, 2014. (4T 192-23 to 195-24) Because Bailey could not communicate details of a briefing that she had no idea would occur until months later, the messages thus could not pertain to the future alleged crime of disclosing the contents of an intelligence briefing. Also, while the State argued at trial that these messages showed that Bailey had been disclosing confidential information Edwin, because the messages themselves did not relay the alleged divulged information, they did not have a causal connection to the alleged official misconduct. (11T 137-22 to 138-12)

Indeed, a limited crime-fraud exception is the best way to effectuate society's interest in protecting marital harmony because when construed too broadly, it undermines our democratic society. Pillow Talk, 67 Ark. L. Rev. at, at 988 ("When a governing body grants such unreasonable intrusions into the marital privacy of its citizens, the vestiges of democracy are slowly chipped away.") (emphasis added). It also violates the

intimacy and trust between partners. See Cynthia Ford, He Loves Me? He Loves Me Not? He Wants to Keep Me from Testifying?, 39 Mont. Law. 35, 35 (2014) ("The justification for the privileges which are recognized by the law is uniform: the relationship between the persons to the communication itself serves the public good, and the ability of the parties to speak freely and without fear of later disclosure is essential to that beneficial relationship."). As it stands, the Appellate Division's opinion will allow the crime-fraud exception to be inappropriately applied as it was here, against a spouse who only sought solace and comfort in her partner. See Trammel 445 U.S. at 51 (describing marriage as "the best solace of human existence").

The marital privilege is critical because it effectuates human fulfillment and dignity by affording allowing them to feel safe and secure in their own homes. Pillow Talk, 67 Ark. L. Rev. at 970; Marital Privileges in a Criminal Context, 43 Wash. & Lee L. Rev. at 218 ("When a couple invests trust and confidence in a marriage, the marriage exudes harmony and tranquility. Through the common-law evolution of the marital privileges, courts designed the privileges to foster trust, honesty, openness, and peace of mind.") (emphasis added). This corresponds directly with our highly cherished right to privacy, which from its inception has "encompassed the home and such personal matters as one's physical condition, family affairs, and intense emotions,

like shock and grief." Pillow Talk, 67 Ark. L. Rev. at 975; United States v. Brock, 724 F.3d 817, 820-821 (7th Cir. 2013) (explaining that marital communications privilege exists "to ensure that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law"). If not within its proper limitations, the crime-fraud exception will impermissibly infringe a couple's ability to feel safe in their union. And, without a safe place to turn to in good times and bad, our democratic processes would also suffer because individuals would be unable to "exercise their personal liberty and autonomy to the fullest." Pillow Talk, 67 Ark. L. Rev. at 984-86. Accordingly, it is imperative that the marital privilege continues to be safe haven for couples to share their "deepest fears and vulnerabilities," such as remorse or disappointment, which a criminally involved spouse will reasonably feel as a consequence of their actions. Id. at 982.

In sum, the marital privilege becomes meaningless if not applicable to circumstances when spouses go within their zone of privacy to seek solace and comfort. An integral component of marital harmony is the ability for partners to trust each other as a safe space where they can unburden themselves during their most difficult moments. It is an inescapable part of life that, occasionally, a spouse will find themselves in trouble and will need to seek out their partner for emotional support. Because

good and bad times are a certainty of the human experience, it is necessary that marital confidences, like the private thoughts and feelings shared between Bailey and her husband -- merely discussing but not furthering criminal activity -- remain protected under the marital privilege. Accordingly, because the conversation between Bailey and Edwin did not advance any joint, ongoing, or future crime, the court erroneously admitted this evidence. As discussed at length in Point I, the improper admission of these text messages greatly prejudiced Bailey because the State relied on the exchange as evidence of Bailey's purpose to confer a benefit on herself and the conspiracy and consciousness of guilt. (see 4T 34-1 to 6; 11T 109-21 to 24) Accordingly, this Court should reverse Bailey's convictions.

CONCLUSION

For the foregoing reasons, and those expressed in Bailey's prior briefs in this case, this Court should reverse Bailey's convictions, and remand for further proceedings.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: _____
CANDACE CARUTHERS
Assistant Deputy Public Defender

DATED: July 28, 2021

Candace Caruthers, Esq.
9123 East Mississippi Ave Apt 10-304, Denver, CO 80247 | Caruthers.Candace@gmail.com | (440) 452-7251

Writing Sample #3

This writing sample is a Brief I filed in June 2020. In this case, I successfully argued that reversal was necessary because the trial court improperly barred my client from presenting his own DNA expert about the validity of the novel genotyping software, STRmix. At the time, the software had only been used in New Jersey criminal prosecutions for about six months. The Appellate Division held that the trial court's ruling "usurped L.B.'s fundamental right to mount a defense, which could have changed the outcome." *State of New Jersey in Int. of L.B.*, No. A-1227-19, 2021 WL 1168389, at *3 (App. Div. Mar. 29, 2021).

For brevity, Points II and III have been removed from this version. Suggestions from brief reviewer have been implemented, but all major edits and arguments in this Brief are my own.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1227-19

CRIMINAL ACTION

STATE OF NEW JERSEY	:	On Appeal from an Adjudication of Delinquency and Disposition
IN THE INTEREST OF	:	Entered by the Superior Court Of New Jersey, Family Part,
L.B.	:	Union County
	:	Docket No. FJ-20-541-18
	:	Sat Below:
	:	Hon. John G. Hudak, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF JUVENILE-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

CANDACE CARUTHERS
Assistant Deputy
Public Defender
Attorney ID# 301772019

Of Counsel and
On the Brief
Candace.Caruthers@opd.nj.gov

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TABLE OF JUDGMENTS, ORDERS AND RULING BEING APPEALED

[1] These secondary sources, which include articles authored by the creators of the controversial software used in this case, are appended to this brief pursuant to R. 2:6-1(a)(1)(I).

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PRELIMINARY STATEMENT

The State's gun possession charges relied heavily on its expert's conclusion that the juvenile's DNA was present in swabs taken from a gun. In reaching this conclusion, the State's expert relied on the brand new and extremely complex probabilistic genotyping software program, STRmix. Far from the traditional, universally accepted method of DNA testing, STRmix pushes the bounds of forensics far past what scientists generally accept. Because of the controversial technology used and the importance of DNA evidence for the State's case, it was critical that the juvenile be allowed to competently challenge the State's DNA expert. However, the court's refusal to grant the juvenile's DNA expert additional time to prepare for trial precluded the juvenile's expert from testifying, thereby denying L.B. a meaningful opportunity to present a complete defense since his counsel could not consult an expert to effectively prepare for cross-examination or put on affirmative evidence of the software's well-documented and serious issues.

In addition, the State elicited expert testimony that the juvenile intended to distribute narcotics, which improperly functioned as a pronouncement of the expert's belief that the juvenile was guilty of the drug offenses. Together and separately, these errors denied the juvenile a fair trial and reversal is required.

PROCEDURAL HISTORY

On January 23, 2018, a juvenile complaint was filed under Docket No. FJ-20-541-18 in Union County charging L.B. with offenses, which if committed by an adult, would constitute: second-degree unlawful possession of a firearm, under N.J.S.A. 2C:39-5b(1) (charge one); fourth-degree possession of hollow point bullets, under N.J.S.A. 2C:39-3(f) (charge two); second-degree possession of a firearm while possessing drugs with intent to distribute, under N.J.S.A. 2C:39-4.1 (charge three); third-degree drug possession, under N.J.S.A. 2C:35-10(a)(1) (charges six and seven); third-degree drug possession with intent to distribute, under N.J.S.A. 2C:35-5(a)(1) (charges eight and nine); second-degree drug possession with intent to distribute within 500 feet of a public park, under N.J.S.A. 2C:35-7.1(a) (charges ten and eleven); third-degree drug possession with intent to distribute within 1000 feet of a school, under N.J.S.A. 2C:35-7(a) (charges twelve and fourteen); and the disorderly persons offenses of obstruction, under N.J.S.A. 2C:29-1a; unlicensed entry, under N.J.S.A. 2C:18-3a; and marijuana possession, under N.J.S.A. 2C:35-10(a)(4) (charges four, five, and thirteen). (Ja 1-7)[2] The State dismissed the unlicensed entry charge. (4T 19-25 to 20-6)

[2] The following abbreviations will be used:

The State filed a motion to obtain buccal swabs from L.B. and juvenile co-defendant A.W., which in an oral opinion on May 2, 2018, the Honorable John G. Hudak, J.S.C., granted. (2T 24-17 to 30-6)[3] The swabs were analyzed by the State's DNA expert and her report was given to L.B. on June 4, 2018. (3T 5-3 to 15) At that time, L.B.'s counsel requested and received an adjournment, which was unopposed by the State. (3T 5-22 to 6-3) Trial was rescheduled to begin approximately seven months later. (See 4T)

In January 2019, Judge Hudak conducted a joint trial for L.B. and A.W. (4T, 5T, 6T, 7T) On January 16, 2019, the court adjudicated L.B. and A.W. delinquent of all remaining charges. (8T 13-10 to 15-5; Ja 8-9) At the disposition hearing on February 6, 2019, the court imposed the maximum possible probation term of three years, with 18 months of participation in the Juvenile Intensive Supervision Program and 18 months of probation. (9T 38-7 to 39-4; Ja 8-9)

"Ja" — Juvenile's appendix
"1T" — April 10, 2018 — Motion Hearing
"2T" — May 2, 2018 — Motion Hearing
"3T" — June 4, 2018 — Motion Hearing
"4T" — January 7, 2019 — Trial
"5T" — January 8, 2019 — Trial
"6T" — January 9, 2019 — Trial
"7T" — January 10, 2019 — Trial
"8T" — January 16, 2019 — Adjudication Decision
"9T" — February 6, 2019 — Disposition Hearing

[3] L.B. and A.W. filed joint motions to reveal a confidential informant and suppress physical evidence, which Judge Hudak denied. (1T 37-4 to 5; 3T 119-9 to 14)

STATEMENT OF FACTS

On Tuesday, January 23, 2018, at 4:58 p.m., Elizabeth police detective Luis Garcia and two other officers went to 429 Westminster Avenue, a private rooming house. (4T 27-16 to 28-11, (35-10 to 13) The officers arrived in a non-descript car and parked a few feet away from the entrance. (4T 35-1 to 4) Without conducting on-site surveillance, the officers approached the vestibule area and used a key to enter which they had previously received from the building's manager to monitor the building's common areas. (4T 36-9 to 13, 84-3 to 5, 84-23 to 85-6)

Garcia testified that, as he entered, he saw three young men, and that one of them, the juvenile L.B., placed his hand on a "dark object" near the right side of his waistband and immediately began running up the building's main staircase. (4T 43-2 to 8) Police then shouted, "This is police, stop!" (4T 44-16 to 17) The other two individuals, juvenile co-defendant A.W. and adult co-defendant Jaques Ellison, also began running, following after L.B. up the stairs. (4T 44-9 to 19)

The police pursued the young men. (4T 44-20 to 45-1) As soon as the officers reached the top of the stairs, they tried to open the door to Room 4 because they believed that they saw the boys go inside. (4T 49-19 to 50-1) Realizing the door was locked, the police began to kick it down. (4T 105-20 to 106-10) From past experience, the officers were aware that Room 4 was

leased to adult co-defendant Diane Koto. (4T 88-2 to 4; See 8T 37-10 to 18)[4]

After forcing their way in, Garcia testified that the officers entered the room shouting "police, police," and turned on the lights. (4T 49-19 to 50-1) Garcia stated that he then saw the boys laying like they had been sleeping. (4T 51-11 to 13) L.B. and Ellison were laying on the floor and A.W. was on the bed with Koto.[5] (4T 51-6 to 13)

All four individuals were immediately handcuffed and searched. (4T 64-13 to 69-15) Garcia testified that, as he handcuffed L.B., he looked over and saw a gun inside a small cubby-hole near where L.B. had been laying. (4T 52-18 to 53-6, 109-14 to 16) While nothing was found on L.B. or Koto when they were searched, baggies of heroin were found on A.W. and glassine envelopes of heroin and baggies of cocaine were found on Ellison. (4T 64-13 to 69-15) After everyone was handcuffed, police found suspected heroin, later determined to actually be quinine, and cocaine under Koto's bed, and marijuana on her dresser. (4T 69-16 to 25, 70-1 to 6, 75-25 to 76-4)

[4] Occasionally, "Diane Koto" is referred to in the transcripts as "Diana Coto" or "Ms. Kudos." "Koto" will be used in this brief.

[5] Pre-trial, testimony was elicited from one of the arresting officers that Koto gave a statement indicating that, although the two were not blood relatives, A.W. was like a nephew to her. (3T 72-20 to 25, 104-16 to 22)

The State presented DNA evidence from the gun with a resulting match statistic that was computed by a new and extremely complex computer software program called STRmix. (6T 26-15 to 54-14) Police swabbed the gun for DNA testing in four areas: the "grip," "trigger," "slide and frame," and "magazine." (6T 36-18 to 23; 7T 13-8 to 14-2) Those swabs were tested by Union County Prosecutor's Office Forensic Laboratory and interpreted by forensic scientist Monica Ghannam. (6T 11-18 to 23, 26-11 to 13)

Ghannam testified that her lab only began using the STRmix software in May 2017, approximately eight months before this trial began. (6T 11-18 to 23) According to Ghannam, the software could be used to analyze "complex mixtures," in which there are three or more DNA contributors present in a DNA sample. (6T 11-18 to 23; 13-13 to 15) Prior to the STRmix software, Ghannam explained that four-person mixtures, such as those found on the swabs from the gun's "grip," "trigger", and "magazine," could not be tested by her laboratory. (6T 14-1 to 4, 41-20 to 43-10)

Ghannam further testified that she had received no training or certifications for the STRmix software, as none yet existed. (6T 12-10 to 16, 13-10 to 12) She stated that she had only testified once before about a DNA analysis she conducted using the STRmix software, during which she used the software to evaluate a three-person mixture. (6T 11-6 to 9, 14-20 to 25) She

also explained that, in her opinion, although the practice of analyzing complex mixtures has "some detractors," she did not believe it to be controversial subject in the scientific community. (6T 56-23 to 57-4)

Regarding the results of her analysis of the gun evidence samples, Ghannam testified that she declined to interpret results from the swab of the gun's "slide and frame" because it yielded a mixture of what appeared to be at least five individuals, and her lab's policy did not permit her to test mixtures with more than four contributors. (6T 42-12 to 24) Ghannam testified that the three remaining swabs from the "grip," "trigger," and "magazine" yielded mixtures of what appeared to have at least four contributors, and thus, she determined that the swabs were suitable for comparison. (6T 41-20 to 43-10)

Ghannam used the DNA sample from L.B. and A.W. to develop a profile for them and compared it to the profiles from the swabs of the gun's "grip," "trigger," and "magazine." (6T 48-1 to 53-12, 112-17 to 114-25) The gun was not tested for the DNA of the two adult co-defendants, Ellison and Koto. (6T 74-2 to 7)

Ghannam testified that her DNA analysis revealed that there was "very strong evidence" that L.B.'s DNA was on the "grip" and "strong evidence" that L.B.'s DNA was on the "trigger." (6T 51-18 to 52-13) However, L.B.'s DNA was excluded as a contributor on the "magazine." (6T 51-7 to 17) It was more likely that

A.W.'s DNA present on the grip than L.B.'s, since Ghannam testified that her results showed that there was "extremely strong evidence" that A.W.'s DNA was present. (6T 48-1 to 13) For the comparison of A.W.'s DNA with the swabs from the trigger and magazine, however, Ghannam testified that no conclusions could be reached. (6T 48-14 to 50-9)

The State also called Detective Anthony Reimer of the Union County Prosecutor's office to testify as an expert in narcotics distribution and investigation. (5T 48-21 to 49-1) Reimer testified that the fact that no drug paraphernalia was found in Koto's room indicated that L.B. possessed the heroin and cocaine "to distribute such, not ingest it." (5T 61-16 to 23) Reimer further stated that the recovery of two different forms of narcotics showed that L.B., A.W., and Ellison were, "like a convenience store. They offer something for everybody." (5T 62-4 to 5) Reimer also opined that the young men made this strategic decision to "[increase] the chances of generating a profit from [their] sales . . . If they one sold one product . . . their price would be very limited. But if they offer [two] they've now opened it up to a new market, thereby increasing the amount of profits they could potentially gain." (5T 62-6 to 13) Reimer declared that "based on his training and experience," it was clear to him that the narcotics were possessed "for distribution in this particular case." (5T 77-18 to 23)

POINT I

THE TRIAL COURT IMPROPERLY REFUSED TO GRANT THE JUVENILE'S DNA EXPERT FURTHER TIME TO PREPARE FOR TRIAL, THEREBY DENYING THE JUVENILE OF HIS RIGHTS TO PRESENT WITNESSES IN HIS DEFENSE AND EFFECTIVELY CONFRONT THE WITNESSES AGAINST HIM. (4T 8-6 to 12-2; 6T 16-13 to 18-14)

On the day that L.B.'s trial was scheduled to begin; his counsel informed the court that her DNA expert needed more time to prepare for trial. (4T 9-7 to 12) L.B.'s counsel argued that an expert was necessary to properly challenge the State's expert's reliance on the new and problematic STRmix computer software to analyze the DNA swabs taken from the gun found in Koto's bedroom. (4T 8-14 to 23) Although L.B.'s counsel had been given seven months to obtain a DNA expert, unavoidable delay had occurred due to the vendor compliance procedures required by the Office of the Public Defender ("OPD"). (4T 9-4 to 12) As L.B.'s counsel explained, her DNA expert had finally overcome this administrative hurdle and was now vendor compliant, but lacked "enough time to prep this case and testify as a witness in this trial." (4T 9-9 to 12) Accordingly, L.B.'s counsel argued that proceeding with the trial as scheduled violated L.B.'s right to confrontation. (4T 9-19 to 20) L.B.'s counsel also asserted that an expert was needed to adequately cross-examine the State's expert. (6T 19-1 to 5)

Notably, the DNA expert's conclusions were the State's best evidence of L.B.'s alleged gun possession, since all of the State's other evidence was circumstantial. Still, despite the critical importance of the DNA evidence in this case and the novel software used to analyze it, the trial court refused to grant L.B.'s expert any additional time, stating that, its "docket [could] not be held up" since "the need to get an expert is not an open-ended need" and the court wanted to protect L.B.'s right to a speedy trial. (4T 10-11 to 12-12) The court's decision was erroneous.

Because L.B. was unable to utilize his own expert, the State's expert Monica Ghannam presented not only unchallenged testimony, but inaccurate information concerning the supposed reliability of the STRmix software. Had L.B. been able to properly challenge Ghannam's testimony — either on cross or by offering his own expert witness — he could have seriously weakened her conclusions and undermined the State's claim that L.B. possessed the gun. The court's decision violated L.B.'s rights to due process, a fair trial, and the opportunities to present witnesses in his own defense and confront the witnesses against him, and thus, reversal is required. U.S. const. amends. V, VI, XIV; N.J. const. art. I, ¶¶ 1, 10. Alternatively, this Court should order a remand for a hearing pursuant to Frye v.

United States, 293 F. 1013 (D.C. Cir. 1923), N.J.R.E. 702, and N.J.R.E. 104, to evaluate the reliability of STRmix.

A. Reversal is Required Because the Juvenile's DNA Expert Was Necessary for Him to Present a Complete Defense and Effectively Challenge the State's Most Important Evidence.

"In our adversarial system of justice, the defendant gets to choose whom to place on the stand, provided the witness can offer relevant testimony." State v. Garcia, 195 N.J. 192, 207 (2008). "[A defendant] is entitled to a fair opportunity to present his best defense and to engender a reasonable doubt as to his guilt." State v. Bellamy, 329 N.J. Super. 371, 377 (App Div. 2000). Thus, the right "to elicit testimony favorable to the defense before the trier of fact" has "long been recognized as essential to the due process right to a 'fair opportunity to defend against the State's accusations,' and thus 'among the minimum essentials of a fair trial.'" State v. Garron, 177 N.J. 147, 169 (2003) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)); see also Garcia, 195 N.J. at 201-02 ("Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee . . . nothing less than a meaningful opportunity to present a complete defense."). Likewise, the "opportunity to cross-examine a witness is at the very core of the right to confrontation." State v. Cabbell, 207 N.J. 311, 328 (2011).

First, it was error for the court to refuse to allow L.B.'s expert additional time to prepare for trial because there are "few rights are more fundamental than that of an accused to present witnesses in his own defense." State v. Sanchez, 143 N.J. 273, 282, 290 (1996); see also Washington v. Texas, 388 U.S. 14, 23 (1967) (holding that Texas statute which prohibited accomplices from testifying for each other violated the defendant's Sixth Amendment right present witnesses in his favor). Second, the court's decision was harmful because it precluded L.B. from presenting a complete defense by presenting affirmative evidence illuminating the weaknesses in Ghannam's conclusions and the STRmix software, and, since L.B.'s counsel could not confer with her own expert, the "crucible of cross-examination" was rendered utterly meaningless in this case. Crawford v. Washington, 541 U.S. 36, 61 (2004).

i. The Trial Court Improperly Denied L.B.'s Expert Additional Time to Prepare for Trial.

When a defense witness is not produced in time for trial, the trial court must adjourn the case if the absent witness's testimony will be favorable to the defense. Garcia, 195 N.J. at 207; see also Bellamy, 329 N.J. Super. at 378 ("When balancing a short delay in the start of trial against defendant's legitimate ability to present a viable defense . . . the integrity of the criminal process must prevail over the administrative

disruption.") (emphasis added). In Garcia, the defendant had subpoenaed a witness to testify who was being held in the county jail. Garcia, 195 N.J. at 204. Yet, due to administrative miscommunication, which was in no way the fault of defense counsel, the witness was not produced for trial. Id. at 198, 204-05. Defense counsel requested additional time to produce the witness. Id. at 199. The judge denied defense counsel's request and ordered that the trial proceed, so the defense rested without producing any witnesses. Ibid.

This Court concluded that it was error for the judge to refuse to briefly adjourn the trial until the defense's witness could be produced because "the constitutional right to compulsory process . . . is integral to ensuring a fair trial." Id. at 203, 205. While acknowledging the trial court's authority to manage a criminal proceeding, the Court explained that: "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. Id. at 202 (quoting Chambers, 410 U.S. at 302); see also Sanchez, 143 N.J. at 282 ("An interest in judicial economy cannot override a defendant's right to a fair trial."). Accordingly, the Court found that "instead of blaming defense counsel, who was powerless to

overcome official intransigence," the judge should have adjourned the trial and ordered the county jail to produce the witness. Garcia, 195 N.J. at 205. The Court remanded the case back to the trial court to determine whether the excluded witness would have given testimony favorable to the defendant; if so, then it held that "the defendant will have shown that his constitutional right to compulsory process was violated [and] defendant's convictions must be vacated, and a new trial granted. Id. at 207-08.

Likewise, the Court has resoundingly acknowledged that a defendant's request to present expert testimony is a critical component of the exercise of his fundamental rights, and thus, must be carefully evaluated. See, e.g., State v. Jenewicz, 193 N.J. 440, 451, 454 (2008) (finding error in the trial court's preclusion of the defendant's expert testimony because of N.J.R.E. 702's "liberal approach favoring admissibility, and the substantial liberty interest at stake for defendant") (internal citations omitted). For instance, in State v. Kelly, 97 N.J. 178, 201 (1984), the State sought to prevent the defendant from offering an expert witness to testify about battered-women's syndrome. The defendant argued that the expert's testimony was necessary to rebut her murder charges by showing that she acted in self-defense. Id. at 188, 200. The Court agreed with the defense, reasoning that self-defense was the central issue in

the case, and thus, the testimony would allow the jury to properly assess the defendant's credibility. Id. at 202-04; see also State v. King, 387 N.J. Super. 528, 539, 546 (App. Div. 2006) (granting the defendant's request for expert psychiatric testimony about the reliability of his confession because it was "the linchpin of the State's case as there apparently [was] no physical evidence linking defendant to the murder"). Reversing the trial court's ruling excluding the expert's testimony, the Court noted that it had a duty to "[protect] the defendant's due process rights by allowing her to offer testimony to establish a defense." Kelly, 97 N.J. 178 at 215-16, n. 11.

Here, instead of the harshest possible penalty of preventing L.B. from relying on its own witness to challenge the State's DNA expert, as in Garcia, a brief stay was the proper remedy. (4T 10-11 to 12-12) A stay was even more appropriate here than in Garcia, where the trial had already begun, because L.B.'s counsel alerted the court about the delay before trial was to begin. In addition, the pre-trial issues of the expert's vendor compliance with OPD policies, while lengthy, had concluded. (4T 9-9 to 12) Thus, the judge's rationale for moving forward without the expert, that its "docket [could] not be held up," was not practical, since it was reasonable to expect that actually only a short amount of additional time was needed for the expert to prepare its report. (4T 10-11 to 12-12) And

certainly, it was improper for the court to justify its decision based on the interests of judicial economy, which our Court has ruled are secondary to L.B.'s right to a fair trial. See Sanchez, 143 N.J. at 282.

Also, similar to Garcia, the court acknowledged that the delay was not the fault of the juvenile's counsel, stating it wouldn't "put this on the attorneys before [the court] because it's not partially their problem. They work for the Public Defender's Office, which has to go through certain procedures." (4T 11-3 to 5) Thus, it was inappropriate for the court to punish L.B., "who was powerless to overcome" the administrate policies of the OPD, by denying him his right to present a complete defense. Garcia, 195 N.J. 192 at 205.[6] Because only Ghannam was allowed to opine on the validity of the controversial STRmix software, the resulting verdict was improperly based on a "partial or speculative presentation of the facts," Garcia, 195 N.J. 192 at 202, and the court's decision to proceed without L.B.'s expert was error.

[6] In effect, the court's decision punished L.B. for being poor, as he needed to rely on the services of the OPD, which had a lengthier process for obtaining experts. See generally N.J. Office of the Pub. Def., Vendor Contract Compliance Requirements, (Mar. 19, 2019), available at: https://www.nj.gov/defender/documents/Waiver%20VCC%20Requirements%20%2003-19-2019.pdf. As the court acknowledged, if L.B. had access to the funds necessary to pay a private attorney, there would have been no need for a vendor compliance delay. (4T 11-6 to 8)

ii. The Trial Court's Erroneous Decision Was Harmful Because the Expert Would Have Provided Favorable and Indispensable Testimony about the Novel Probabilistic Genotyping Software.

Moreover, as the Court noted in Kelly, denial of the defendant's expert is of particular concern when such evidence is necessary to establish a defense. Kelly, 97 N.J. 178 at 215-16, n. 11. Here, the judge's decision to proceed to trial without L.B.'s expert denied L.B. the protections set forth by the Court in Kelly, because he was denied testimony that could prove his defense. Throughout trial, L.B.'s counsel maintained that the State could not prove beyond a reasonable doubt that L.B. possessed the gun or that he had knowledge of it. (4T 21-16 to 22, 22-17 to 22; 7T 67-3 to 10) Thus, as in Kelly, where it was necessary for the defense's expert to testify about self-defense in a murder case, the defense needed an expert to rebut the validity of the software used to link L.B.'s DNA to the gun. See Kelly, 97 N.J. at 188, 200.

Aside from the DNA, the State presented only circumstantial evidence suggesting L.B. possessed the gun. Garcia was the only officer that testified at trial. (4T 26-23 to 82-12) The inference that L.B. was carrying a gun based on Garcia's assertion that he saw L.B. with a "dark object" was seriously undermined by his admission that he never actually saw L.B. holding, pointing, or using a gun. (4T 43-2 to 8, 102-20 to 103-

9) Moreover, even though Garcia stated that he believed he saw L.B. keep his hand near his waistband while he ran up the stairs, he admitted that L.B.'s back was turned to him the entire time. (4T 44-5 to 8, 104-15 to 16) The mere fact that L.B. ran in response to suddenly being approached by three armed officers simply invokes our Supreme Court's candid acknowledgement that "a young man in a contemporary urban setting might run at the sight of the police." State v. Tucker, 136 N.J. 158, 169 (1993).

Additionally, Garcia's testimony that L.B. was laying on the floor, in a room that he did not own, near where the gun was recovered, (4T 22-11 to 16, 52-1 to 18), without more, cannot establish L.B.'s possession. See State v. Jackson, 326 N.J. Super. 276, 281 (App. Div. 1999) ("[W]here . . . a defendant is one of several persons found on premises where illicit drugs are discovered, it may not be inferred that he knew of the presence or had control of the drugs unless there are other circumstances or statements of the defendant tending to permit such an inference to be drawn.") (emphasis added). Accordingly, L.B.'s mere presence in Koto's room was not enough — the State needed more to prove possession. Yet, Garcia's testimony alone could not establish the requisite "other circumstances" to show that L.B. had knowledge or control of the gun, since Garcia admitted that he never saw L.B.'s hands near the cubbyhole where the gun

was found. (4T 43-2 to 8, 102-20 to 103-9, 113-23 to 25) As such, the State's case heavily relied on Ghannam's testimony and without his own DNA expert to rebut her conclusions, L.B. was essentially helpless to rebut the State's most important piece of evidence.

A DNA expert was especially necessarily due to STRmix's departure from the traditional "gold-standard" method of DNA analysis. PCAST, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, at 25-26; [7] see also Hannah Kelly, et. al., A Comparison of Statistical Models for the Analysis of Complex Forensic DNA Profiles, 54-1 J. of Sci. and Justice 66, 66 (2014) (Ja 119-123) ("Single source 'pristine' profiles are relatively simple to interpret and their analysis has achieved worldwide acceptance as a reliable scientific method.") Unlike traditional DNA analysis, where a scientist examines a sample in which only one person contributed to the DNA sample, STRmix uses a computer program to analyze complex mixtures, where two or more individual's DNA is present. Vera Eidelman, From the Crime Scene to The Courtroom: The Future of Forensic Science Reform: The First Amendment Case

[7] Available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

For Public Access Tt Secret Algorithms Used In Criminal Trials, 34 Ga. St. U.L. Rev. 915, 920-21 (2018).

A DNA expert could have helped L.B. undermine Ghannam's testimony, either during cross-examination, or L.B.'s case-in-chief, by explaining that: (1) it is not generally accepted in the scientific community that a DNA analyst can accurately determine the number of contributors to a complex mixture, like the one used here, for use in a probabilistic genotyping system like STRmix; (2) whether complex mixtures should be analyzed at all, and if so, whether it is proper for software programs to be used, is in fact a controversial issue in the scientific community; and (3) the STRmix software was released with at least three known programming errors. See generally N.J.R.E. 702; J.L.G., 234 N.J. 265, 295 (2018) (explaining that for expert testimony to be admissible, it must have "'gained general acceptance in the particular field in which it belongs.'") (citing Frye, 293 F. at 1014). If an expert had been allowed to explain these issues, L.B. would have been able to support his defense with affirmative evidence showing that Ghannam's conclusions were not reliable. Further, with the aid of pre-trial consultation with the expert, L.B.'s counsel would have been able to effectively cross-examine Ghannam.

First, since Ghannam testified that she alone decided that four contributors were included in the DNA samples from the gun

swabs, (6T 58-12 to 59-11), a rebuttal DNA expert was needed to explain that, in fact, studies have shown that subjective contributor counting by a lab analyst is not a practice that is generally accepted as reliable. Significantly, if Ghannam incorrectly undercounted by just one individual the State would have had no DNA evidence, as Ghannam's office could analyze samples of four contributors, but not five. (6T 14-1 to 4, 42-12 to 24)

Contributor-counting is difficult, errors are common, and contrary to Ghannam's testimony, (6T 93-9 to 20), the likelihood of incorrect contributor-counting increases as the potential contributors increase. See David Paoletti, et. al, Empirical Analysis of the STR Profiles Resulting from Conceptual Mixtures, 50-6 J. Forensic Sci. 1, 4 (2005) (finding that only "approximately three percent of three-person mixtures would be mischaracterized" but "more than 70 percent of four-person mixtures would be mischaracterized").[8] Accordingly, some scholars urge that because the correct number of contributors can never be known with absolutely certainty, "no reliance can or should be placed on the interpretation." Jo-Anne Bright et. al., The Effect of the Uncertainty in the Number of Contributors to Mixed

[8] Available at: https://projects.nfstc.org/workshops/resources/articles/Empirical%20Analysis%20of%20the%20STR%20Profiles%20Resulting.pdf

DNA Profiles on Profile Interpretation, 12 Forensic Science Int'l: Genetics, 208, 210 (2014) (Ja 112-118). Notably, an incorrect determination of "the number of assumed contributors can have a significant impact on the results produced by STRmix." Zane Kerr, Two Years Later: A Reflection on the Implementation of STRmix in a High Throughput DNA Laboratory, New South Wales Forensic & Analytical Science Service, at 4 (emphasis added) (last visited June 23, 2020).[9]

L.B.'s counsel made an earnest attempt to determine the number of times Ghannam had incorrectly assessed the number of contributors by asking her what her "personal error rate" was and whether, "when you determine the number of contributors in a mixture, you can't be sure that you're right, can you?" (6T 56-6 to 15, 58-12 to 21) Yet, Ghannam was not forthright about the controversial nature of contributor-counting and the potential mistakes she might have made as merely she responded that, "The only thing that you can say is a minimum number of individuals." (6T 58-21 to 22)[10]

[9] Available at: https://www.promega.com/-/media/files/products-and-services/genetic-identity/ishi-26-oral-abstracts/6-kerr.pdf.

[10] Although Ghannam failed to discuss the problematic nature of contributor-counting, it has been acknowledged by STRmix's own creators. See Bright, supra, at 209, 214 (Ja 113, 118). Significantly, without the capability to prepare for trial with expert guidance, L.B.'s counsel's questioning lacked the precision necessary to encourage Ghannam to speak more plainly